IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1832 of 2006

with
CRIMINAL MISC. APPLICATION No.11947 of 2006
in
CRIMINAL APPEAL No. 1832 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SUMERSINBH UMEDSINH RAJPUT - Appellant
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MEHUL SHARAD SHAH for Appellant(s) : 1,MR TM CHAUDHARY for Appellant(s) : 1,
MR.H.L,. JANI, ADDL PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 07/12/2006

ORAL JUDGMENT

The appellant-original accused is before this Court being aggrieved by judgement and order dated 27th September 2006 passed by the learned Additional Sessions Judge, 3rd Fast Track Court, Deodar in Sessions case No.1 of 2004.

2. The accused is convicted for offence under sec.307 and was pleased to award five years of rigorous imprisonment and fine of Rs.5000/-, in default 3 months rigorous imprisonment.

3. For offence under sec.353 of IPC he is convicted and two years of rigorous imprisonment, fine of Rs.1000/-, in default 1 month rigorous imprisonment is awarded.

The accused is also convicted for an offence under sec.25(1)(A) of the Arms Act and 3 years rigorous imprisonment, fine of Rs.1000/-; in default one month rigorous imprisonment is awarded.

The learned Judge ordered that all the sentences shall run concurrently with the main sentence. The present appeal was filed on 12.10.2006. The same came up for hearing on 23.11.2006.

After hearing the learned advocate for the appellant and the learned APP this Court passed the following order:

> "1. Mr. Shah, learned advocate for the appellant, vehemently submitted that this is a case wherein the prosecution is not able to prove its case. He submitted that the doctor has stated in cross-examination that the injury sustained by the complainant is not such which could be caused by a firearm.
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> Mr. Shah deliberately did not point out the relevant discussion in this regard in para 15 of the judgment. In para 15, the learned Judge has made threadbare analysis of the medical evidence by doctor and FSL report Exh. 53 and other relevant evidence. In FSL report, it is stated that a firearm was used. The report also states that the clothes of the complainant were having the mark of firearm. Even doctor has stated that

this injury could have been caused by a firearm."

2. Office is directed to call for the record and proceedings so as to reach to this Court on or before 6.12.2006. The matter to be listed on **07.12.2006."**

4. The Record & Proceeding is received on 05.12.2006. The learned advocate for the appellant also made available the certified copies of the relevant evidence. The matter is heard on merits at length.

5. The learned advocate for the appellant submitted that the prosecution has not examined any independent witness. The Panchas, who were examined, and could be considered to be independent witnesses have not supported the case of the prosecution. They have turned hostile. The learned advocate submitted that the prosecution has failed to establish any case against the appellant-accused, and therefore, the appeal be admitted and the accused be released on bail. He submitted that all through out the trial he was on bail.

The learned advocate for the appellant submitted that

the case of the prosecution is highly improbable. He submitted that the case of the prosecution is that the accused was sitting on driver's seat in a jeep car described as TATA SPECIO; three other persons were also sitting in that vehicle but they ran away when the Police party followed them. The injured complainant-PSI Babaji Jawanji Vaghela came near the vehicle wherein accused appellant was sitting on the driver's seat and asked him to get down of the vehicle. But he did not do so. PSI Babaji Jawanji Vaghela tried to got him down by holding him from the body. While he was so doing, the other three Police personnel came to help him-PSI Babaji Jawanji Vaghela. At that a scuffle took place between the accused and PSI, Babaji Jawanji Vaghela.

It is the further case of the prosecution that during that scuffle the accused snatched the service revolver of the PSI, Babaji Jawanji Vaghela and fired at him-PSI, which caused an injury as bullet passed touching the right side of the body.

6. The submission of the learned advocate for the appellant is that when a person is surrounded by four

Policemen, and held by the body by PSI, there is no question of the accused snatching a revolver and firing.

7. The learned advocate for the appellant submitted that there is material discrepancy with regard to the injury caused by the fire arm. He submitted that if a bullet fired by the accused had entered the clothes of the injured-complainant-PSI Babaji Jawanji Vaghela, as is the case of the prosecution, there would have been two holes, on each of the clothes of the injured, namely, pant, shirt and '*bandi*'. He submitted that as there is material discrepancy regarding holes on the clothes, the case of the prosecution must fail. He submitted that in any case, the same cannot be said to have been proved beyond doubt. Therefore, the accused must get benefit of the same.

8. Learned advocate for the appellants submitted that the doctor is the best witness, who is an independent witness. Dr.Deepakkumar Dharmaji Gehlot is examined as PW-5, at exh.26.

The Doctor has deposed that, 'on 14.04.2005 at 06.15 PM, he was on duty at Referral Hospital, Tharad. At that time the Police had come with a Yadi and had brought Babaji Jawanji Vaghela, the injured complainant-PSI. He was examined by the doctor. The doctor was told that as the opposite party has fired at him from his service revolver and he has sustained injuries.'

The doctor has further deposed that, 'on examination he found that on the waist portion of the injured, on the right hand side, on the outer surface, there was a superfluous scratch admeasuring 1 cm. X 1.5 cm. On the clothes there was something like black gas. On the '*bandi*' a puncture was noticed. Beyond that, no other injury was noticed.

Thereafter, the doctor gives his opinion and states that, 'the aforesaid injury is possible by rubbing of any rough surface within 6-8 hours of coming to the hospital'. He further opines that, 'if no other complications arises the injury is to take about a week's time to get healed.'

The doctor then opines that, 'the injury was of a simple nature. If a bullet is fired from service revolver and if the same had passed touching the part of the body, on which the patient sustained injury, **such injury is possible**.'

9. The deponent (doctor) is shown the shirt and Banian (vest). Looking at the same he states that, 'the marks which are on these two clothes (the clothes worn by the injured) are possible with the bullet injury (lasarka).

10. The learned advocate for the appellant invited attention of the Court to the cross examination of this doctor. From the answers given in cross examination it is clear that the doctor has answered the questions on assumptions as he is not expected to have knowledge, as an expert.

The doctor has stated that, 'the hole which is found on the '*bandi*', if the shirt is worn above that *bandi*, there has to be a hole in the bush shirt also. Or the shirt is found to get torn.' On the pant there is a round mark by pencil. He states that,

'the same is not torn by a bullet in normal course.' He further states that, 'it is true that on seeing the pant, I say that the pant does not have any entry cut by a fire arm.' He further states that, 'if '*bandi'* is torn from the top, it has to have two holes; one of entry and the other of the exit of the bullet.' If, there is an injury (Lasarka), then if bullet enters the *bandi*, then at the entry point there has to be a 'torn' in parallel direction.

The doctor has then proceeded to depose as an expert on the injuries by fire arm. He states that, 'I do not notice signs of fire arm injury.' He states that, 'it is true that if an injury is caused by fire arm or by bullet, in such injury, edges of the wound are in burnt condition'. He states that, 'in this case he did not notice the signs of burnt skin on both the edges of the injury.' He further states that, 'it is true that if either from 'a short range' or from 'point blank', an injury is caused, there has to be 'blackening' of the injury. I did not find any 'blackening' of injury in this case. There was some blackening of the shirt.' Finally, he says that, 'the injury is possible with a rough surfaced

substance.'

11. The learned advocate vehemently submitted that this evidence of the doctor should be treated to be 'evidence of expert, independent witness' and as he has not deposed that the injury caused to the injured complainant was by fire arm, the case of the prosecution must fall to the ground, and the accused must get benefit thereof and he should be acquitted. In the alternative, the learned advocate submitted that the appeal be admitted and the appellant be allowed to continue on bail.

12. Learned advocate for the appellant next submitted that there is unexplained delay in approaching the doctor and filing of complaint. The incident is said to have taken place at about 12.00 to 12.30 Noon. Whereas the injured complainant went to the doctor at 06.15 PM. There is no explanation by the injured on the point as to where was he for long six hours.

13. The learned advocate for the appellant submitted

that the injury is that of simple nature as deposed by the doctor. It is possible if any rough surface or part of the jeep car is rubbed. In such fact and situation there is no question of an offence under sec.307 of IPC being committed.

Learned advocate submitted that neither the motive nor any purpose to commit such offence is shown. He submitted that therefore, the submission that the accused is falsely implicated for such serious offence under sec.307 of IPC is required to be accepted.

Last but not the least, learned advocate for the appellant submitted that in absence of intention and the knowledge as there was no pre-planning or pre-meditation for committing the offence, the accused cannot be held guilty of offence under sec.307 of IPC.

14. The learned advocate for the appellant submitted that in case the Court is not accepting any of the above submissions then in the alternative his

submission is that at the most the accused can be held guilty of offence under sec.324 of IPC, rather than sec.307 of IPC.

15. The learned advocate invited attention of this Court to material and relevant evidence like deposition of PW-1, Manawarkhan Ashrafkhan Pathan, Panch witness, exh.12, who turned hostile. Amratlal Nathalal, PW-2, exh.20, PSI of C.I.D. Crime, Deesa, who after having narrated the incident of chasing the vehicle in which the accused was sitting on the seat of the driver, after narrating the incident in question on the basis of the information given to him by the injured complainant, in cross examination stated that he does not have any personal knowledge of the incident, which is narrated to him by the injured complainant.

The learned advocate for the appellant submitted that therefore, the entire evidence of this witness is to be discarded as whatever stated by him is nothing but hear-say evidence which is not acceptable in the eye of law.

The submission of the learned advocate for the

appellant cannot be accepted. In fact in the earlier part of his deposition, this witness has stated in detail as to how and how long the vehicle of the accused was chased by the Police Department.

This witness, Amratlal Nathalal has stated that, 'on 14.04.2003 I with PSI, D.R. Parmar; Head Constable Khumaji Ramaji; Head Constable Viramji Mafaji, Police Constable Laxmanbhai Somabhai; and Police Constable, Dineshkumar Kiritbhai and the driver of the Government vehicle started for border patrolling from Palanpur for prohibition Nakabandi. We started at 10.15 from Palanpur through the road leading from Deesa to Dama Village. At that time one 'Tata Specio' vehicle was coming from the opposite direction. It was coming in full speed as the same was found to be in suspicious condition, PSI, D.R. Parmar gave a signal to that vehicle to stop, but that vehicle did not stop. Therefore, we followed the TATA Specio with our vehicle. The vehicle proceeded towards Jorapura. The PSI informed the City P.I. of Deesa and P.I. Deesa (Rural) by wireless message to follow that vehicle. They also continued to follow the vehicle from Jorapura to Yavarpura,

from Yuvarpura to Laxmipura, from Laxmupura to Jenal Road. At that stage, PSI informed the PSI Agthala on wireless that one Tata Specio vehicle, in suspicious condition is coming on the Jenal Road and asked him to follow the same. It was also informed that we were following that vehicle, but our vehicle being larger in size, we are not able to reach to that vehicle. Thereafter, PSI Agthala followed that vehicle and that vehicle took turn to village Lakhni. At that stage, PSI Agthala, P.S.I. Babaji Jawanji Vaghela (the injured complainant) informed the PSI, Tharad and PSI, Deodar by wireless to follow that vehicle. When the vehicle of the deponent came towards village Lakhni, PSI Aghthala informed on wireless that the said vehicle is apprehended near Prathamik School in the sim of Village 'Vela'. On such message being received the deponent with his vehicle went to that place, and on their reaching there, PSI, Babaji Jawanji Vaghela informed him about the incident.' The incident is narrated to the deponent by PSI, Babaji Jawanji Vaghela, that part alone is 'hear-say' evidence. But so far as the fact that, 'in the vehicle only accused was sitting on the driver's seat and that Shri D.R. Parmar, PSI gave signal to that vehicle and despite that it did not

stop and it was required to be chased as stated hereinabove, is deposed by this deponent from his own knowledge.

If this is not a pre-meditated offence, then what else it is? The accused was sitting on the driver's seat, he was trying to run away from the Police. Having failed in that, when apprehended as a desperate he can always resort to and in fact he has resorted to an act which constitutes a heinous crime to have an escape. In such a situation the case of the prosecution that he snatched the service revolver of the injured complainant-PSI Babaji Jawanji Vaghela and fired the same is nothing less than an offence under sec.307 of IPC. It was the good luck of the injured complainant that due to the scuffle the accused missed the vital part of the body, otherwise it would have been still grave.

16. The learned advocate for the appellant also invited attention of the Court to the deposition of Gamanbhai Ranchhodbhai, who is examined at PW-3, Exh.21, who is an agriculturist in the nearby land, who also turned hostile. He invited attention of the

Court to the deposition of Nilabhai Kesharbhai, PW-4, Exh.22.

Learned advocate for the appellant submitted that the narration of the incident by other witnesses and the injured complainant are not the same and they have discrepancies.

It is a matter of which judicial notice can be taken, that persons witnessing one single incident, when asked to narrate the same, their narration can never be the same. The learned advocate for the appellant could not point out any such material discrepancy, which destroys the case of prosecution.

In substance, the incident is, 'a vehicle is chased, it is apprehended, when it stops three persons sitting in the vehicle jump out and run away, while the accused remains seated on the driver's seat. Though PSI, Babaji Jawanji Vaghela, (the injured complainant) asks him to get down the vehicle, he does not carry out the instructions. PSI-Babaji Jawanji Vaghela tries to bring him out by catching

hold of him by the body. Nearby other Police personnel tries to help the PSI Babaji Jawanji Vaghela in getting the accused out of the vehicle, the accused resists PSI Babaji Jawanji Vaghela, it results into a scuffle and taking advantage of that scuffle the accused snatches the service revolver of PSI Babaji Jawanji Vaghela and fires a bullet from the said service revolver.

If in these circumstances an offence under sec.307 cannot be attributed to the accused then what more is required? There is unbroken thread in the evidence led by the prosecution, be it PW-4, Exh.22, be it PW-9, Exh.35, be it PW-8, Exh.33, the injured complainant-Babaji Javanji Vaghela himself, which establishes the guilt of the accused.

It is a well settled position of law that relying on the evidence of the Police personnel alone, which is otherwise found to be trustworthy and reliable by the Court, conviction can be recorded. In the considered opinion of this Court it is rightly recorded by the learned Additional Sessions Judge.

17. In the evidence of the doctor in the chief, he does say that, 'injury is injury sustained and the black dot on the shirt of the complainant is due to use of fire arm, injury is possible by fire arm.' This is later on diluted in the cross examination, but then it is to be kept in mind that the evidence of the doctor was not as an expert on the 'use' of fire arm, and the injuries caused by the fire arm. What is material in this regard is the FSL Report, Exh.53 and other relevant material whereby undoubtedly it has come on record that the very fire arm (service revolver) was used. The carbon found on the shirt and carbon found from the barrel wash of the fire arm found tallying. The blood found on the '*Bandi*' is human blood and of the same group that of the injured complainant; that the injury is found to be the one 'possible by bullet' which was fired from the fire arm in question. Only because the accused missed his aim, it does not reduce his offence from an offence under sec.307 to an offence under sec.324 of the IPC. He is not of such tender age that he will not know the possible implications of use of a

fire arm. There is no question of 'knowledge' being absent. In the present case, he is mature enough to understand the consequences of an injury by fire arm. He is well built, who can resist instructions of the Police Officer, he makes the Police officers run after him, to chase his vehicle for such long. Once there is knowledge about the implications of the use of fire arm, the motive can also be gathered from the use of fire arm.

18. The submission of the learned advocate about there being no pre-plan or meditation about the offence is also not found acceptable inasmuch as he tried to escape from the scene soonafter the vehicle was detected by the Police, as disclosed by PW-2, exh.20 - Amratlal Nathalal, a PSI from C.I.D. Deesa. That was around 10.15 and the vehicle could be intercepted only after about two hours as the incident had taken place at 12.15 PM.

19. The learned advocate Mr.Shah relied upon the following decisions:

(i)Merambhai Punjabhai Khachar and others Vs. State of Gujarat, reported in A.I.R. 1996 SC 3236 [Head Note 'C'];

(ii) Hari Kishan and State of Haryana Vs. Sukhbir Singh and others, reported in A.I.R. 1988 SC 2127;

(iii) Kundan Singh Vs. State of Punjab, reported in A.I.R. 1982 SC 62;

(iv)the Judgement of the Allahabad High Court in the matter between Rameshwar, son of Maiya Din, Vs. State, reported in 2003 CRIMINAL LAW JOURNAL 3437; and

(v) the judgement of the Hon'ble the Apex Court in the matter between Ram Narain Singh Vs. State of Punjab, reported in (1975) 4 SCC 497.

in support of his submissions, particularly, that when there is no knowledge, ingredients of sec.307 do not stand satisfied and therefore, the conviction under sec.307 is bad and at the most it can be only under sec.324 of IPC.

20. As discussed hereinabove this Court is of the

opinion that the learned Additional Sessions Judge has rightly held that the appellant is guilty of an offence under sec.307 of IPC and on careful consideration of the evidence which is read in detail before this Court and in view of the submissions made by the learned APP, Mr.Jani, who invited attention of the Court to the appreciation of the evidence on the point, particularly para 15 of the judgement, wherein FSL Report, exh.53 is considered in detail, this Court finds that the appeal has no merit and it must fail. In the result the appeal is dismissed.

21. At this juncture, Mr.Shah, learned advocate appearing for the appellant submitted that the Court may consider the case of the appellant for reduction of sentence. He submitted that at the time of the incident the appellant was aged 19 years. Now he has two year old female child, his brother is serving in Armed Forces, his father has retired from Police Department and taking into consideration his family background, the sentence be reduced even while conviction is upheld.

The very grounds were put forward while the appellant was heard for the sentence. This Court finds no reason to concede to the request for reduction in sentence. The request is rejected.

22. In view of the fact that the appeal is found without any merit, the same is dismissed, Criminal Misc. application No.11947 of 2006 in Criminal Appeal No.1832 of 2006 has become infructuous and the same is disposed of accordingly.

(RAVI R. TRIPATHI, J.)

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